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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

22 CR 644 (JSR)

5 STEVEN PEREZ, a/k/a LUCHA EL,

6 Defendant.

7 -----x

8 New York, N.Y.
9 February 15, 2023
2:35 p.m.

10 Before:

11 HON. JED S. RAKOFF,

District Judge

12 APPEARANCES

13
14 DAMIAN WILLIAMS,

United States Attorney for the
Southern District of New York

15 BY: ASHLEY CAROLYN NICOLAS

16 MADISON SMYSER

Assistant United States Attorneys

17 DAVID PATTON

18 FEDERAL DEFENDERS OF NEW YORK, INC.

Attorney for Defendant

19 BY: ZAWADI S. BAHARANYI

20 Also Present: COURTNEY DEFEO, Pretrial Services

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(Case called)

MS. NICOLAS: Good afternoon, your Honor. Assistant United States Attorneys Ashley Nicolas and Madison Smyser. We're also joined by pretrial services officer, Courtney Defeo.

THE COURT: Good afternoon.

MS. BAHARANYI: Good afternoon, your Honor. Zawadi Baharanyi with the Federal Defenders Office on behalf of Lucha El, who's seated to my right.

THE COURT: Good afternoon.

All right. So my understanding is that defense counsel seeks a further modification of bail.

MS. BAHARANYI: I do, your Honor. Currently -- may I, your Honor?

THE COURT: Yes, please.

MS. BAHARANYI: Currently, Mr. Lucha El is on home confinement. He has been now since December 7th when he was first arrested. Those conditions, your Honor, were imposed by Magistrate Judge Figueredo. I think since over the past two months, two and a half months of his compliance with no issues, I think we've shown that those are no longer the least restrictive conditions -- for him to continue to be subject to home confinement, placement in his home for 24 hours a day, except for whatever permission may be given for him to leave his home for pretrial.

That, your Honor, is too far, too excessive especially

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1 given the Bail Reform Acts limiting principle that the Court
2 should only impose or maintain the least restrictive conditions
3 for someone to ensure that they don't impose a danger to the
4 community and to reasonably assure that they show up in court
5 again.

6 Your Honor, I put some of this information in my
7 letter to the Court, but I'd like to highlight some of the
8 background factors here about Lucha that I think are pertinent.
9 He's someone who has a single misdemeanor conviction in his
10 entire history. And that's for a misdemeanor drug possession
11 from 2014. There's no other criminal history, there's no other
12 criminal convictions, no violence, no assaults. And even in
13 this case he's charged in, your Honor, there's no allegation of
14 assaultive conduct, a violent conduct. There are no victims,
15 no children involved. Not the sort of circumstances where you
16 might expect someone to be placed, if they were to be released
17 from jail, to be placed on such strict conditions and
18 all-encompassing conditions. Mr. Lucha is here facing his
19 first -- one moment, your Honor.

20 (Defendant and counsel confer)

21 MS. BAHARANYI: Mr. El, which is his preferred name,
22 Your Honor, Mr. El is here and as he's reminded me, there's
23 been no allegation of witness intimidation, any contact with
24 the codefendants in this case. He's been fully compliant. His
25 history shows he's not a danger, and there's certainly no

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1 indication he's a flight risk. I think the Court has seen that
2 he's quite eager to participate in his case, participate in his
3 defense and be heard here, nothing to suggest that such
4 stringent, strict conditions are necessary to reasonably assure
5 his appearance in court.

6 And beyond that, he has no history of failing to
7 appear in court. He does have a pending Massachusetts case, as
8 the Court is aware of. He's made those court appearances even
9 though that's a four-and-a-half hour-plus drive. He will make
10 every court appearance in this case without the condition of --
11 without home confinement.

12 Your Honor, in my letter, I put in a request for a
13 curfew with location monitoring. I would like to make an
14 amendment to that request. I believe given his continued
15 compliance, even since that letter was submitted, the most
16 appropriate, the least restrictive condition that should be
17 imposed here would be strict condition -- strict supervision on
18 pretrial, which means more frequent check-ins but not with the
19 ankle monitor and not with such home confinement conditions
20 that curfew would still encompass.

21 I understand that pretrial opposes that request, but I
22 do think that given what the Bail Reform Act requires us to do
23 in cases like this, that is more than sufficient to ensure both
24 the safety and his appearance in court.

25 THE COURT: We'll hear from the pretrial services

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1 officer in a minute. But especially since you've now changed
2 your proposal, let me hear from the government.

3 MS. NICOLAS: Thank you, your Honor. By way of
4 background the government did seek Mr. El's incarceration at
5 the time of presentment, both arguing on flight and
6 dangerousness. This proposal was first brought to us as an
7 amendment to a downgrade to curfew, we did support that based
8 on the compliance and the information available to us at that
9 time.

10 Certainly, we would not consent to a complete change
11 where we'd remove all monitoring, but I think in light of the
12 letter that's been put forth by Mr. El and received by the
13 government on Friday evening, the government continues to have
14 some reservations based on dangerousness at this point.

15 The alleged conduct in Count Three of the indictment
16 involves the defendant receiving firearms brought to him from
17 out of state, specifically from South Carolina. The course of
18 the conduct, he was once arrested in the Bronx in possession of
19 one of those firearms after a 9-1-1 call was received by the
20 9-1-1 dispatch in New York City saying there was a man, that
21 the caller knew was Lucha, who had a firearm. He did, in fact,
22 have a firearm and it was, in fact, one of these firearms
23 brought to him from South Carolina.

24 The second incident took place in Massachusetts and is
25 referenced by Mr. El in his letter to the Court.

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1 THE COURT: Yes, I'm sorry, I cannot bring up to the
2 courtroom that letter -- let me see if my -- or maybe you have
3 a copy of it.

4 MS. NICOLAS: I do have a copy of it. I can bring it
5 forward.

6 DEPUTY CLERK: Thank you.

7 THE COURT: Yes, I remember this letter well.

8 So this is a letter that was sent from the defendant
9 to the Court, and it's a lengthy letter of some three and a
10 half single spaced pages.

11 The -- it says, it's all about the defendant's
12 disagreement with the government having any ability to forbid
13 gun ownership. It also says to me, "Sir, you have not honored
14 your oath or obligation to support the supreme law of the land.
15 You put police policy codes, municipal rules and regulations
16 before the true law of the land. Judges are obligated to
17 uphold the supreme law of the land and authorized to see that
18 the Constitution is enforced in all controversies of law.

19 "Mr. Rakoff, when I was arraigned two things you said
20 struck me more than anything. You said you would decide
21 whether I can enter any motions on the record and you would
22 protect my 4th and 5th Amendment rights. First, I would like
23 to say there are 10 original Bills of Rights, which I am not
24 limited to. Mr. Rakoff, it is your duty to protect all my
25 rights, not just the ones you feel like preserving.

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1 "Second, I am aware of the abuse of authority you
2 displayed in telling me I can't turn in any motions unless you
3 decide to accept them. As if my 1st Amendment right did not
4 exist.

5 "Mr. Rakoff, if a judge could decide when and which
6 motions to accept, then the judicial system wouldn't be
7 necessary as you would then be taking the position of
8 prosecutor from the bench.

9 Since you can't decide which motions to read, I ask
10 that the GPS monitoring system be removed since you've had
11 ample time to read it, and the prosecutor did not show any
12 factual basis that it doesn't violate my 4th Amendment right.
13 Something else that alarmed me was your attempt to belittle me
14 and talk as if it was necessary for me to pass the bar in order
15 to comprehend law. There is no secret to what the law is as
16 aforementioned the Constitution is the Supreme Law and nothing
17 is above it on this land."

18 And then he goes on at some length about the second
19 amendment, and what it does in terms of his right to bear arms.

20 He then goes onto say that what's happened to him
21 was not coincidence -- "not by coincidence but because of the
22 events that unfolded in the prejudice state of Massachusetts."
23 And he says that, "You, Mr. Rakoff, by dishonoring your oath
24 are setting me up for the same tragedy."

25 He goes on to say that "Mr. Rakoff, is it a

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1 coincidence that for years my people have been denied licenses
2 for arms to preserve their lives as well as the fruit of their
3 loins, meanwhile living in worse neighborhoods and being
4 consistently targeted by the police mercenaries."

5 So an interesting look. It does suggest -- well, let
6 me hear from the government what you make of this letter.

7 MS. NICOLAS: I raise it only, your Honor, because I
8 think it does bear on the government's evaluation of the
9 defendant's continued dangerousness as to the community. In
10 that he continues to assert that these laws are illegitimate
11 and in no way makes clear that he understands that the gun laws
12 of the United States do, in fact, apply to him with full force.
13 And insofar as we evaluate bail determinations, we're looking
14 to both dangerousness and to flight.

15 On the flight grounds, grave concerns that the
16 defendant has made clear that he has an issue with the Court,
17 and I think that it's relevant insofar as pretrial services, as
18 an arm of the Court, is able to enforce the mandates the Court
19 as it applies to the compliance with pretrial supervision.

20 So I think at this point, it does not make sense, it's
21 not prudent to remove the conditions as they currently are
22 stated as they apply to this defendant.

23 THE COURT: And what curfew, assuming we go back to
24 that proposal, what curfew timing would you agree to?

25 MS. NICOLAS: I think typically the government's

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1 position was to defer to pretrial in that they can best
2 evaluate how to accommodate the defendant's needs and the
3 curfew. And I think Ms. Defeo can address that. I would
4 suggest that it should be fairly early in the morning evening.
5 The defendant's first gun arrest was in the evening in the
6 Bronx at a time when he was spending time on the sidewalk,
7 hanging out, as many people do, and there's certainly nothing
8 wrong with that, but I do have concerns that that is where this
9 type of behavior stems from.

10 THE COURT: All right. Let me -- I'm sorry, did you
11 want to respond before we turn to pretrial services?

12 MS. BAHARANYI: I do, your Honor.

13 I think to the extent we've turned to the letter,
14 there are a number of things I want to address with respect to
15 that letter. I do not think it's any evidence of dangerousness
16 or risk of flight. What is in that letter are Mr. El's views
17 on the law, on the government. Sometimes views on the Court as
18 well. But purely his views and his opinions solidly, squarely
19 governed and covered by the 1st Amendment. I do not see --

20 THE COURT: So let me ask you, just on a going forward
21 basis. So he's represented by counsel, he's very fortunate to
22 have extraordinarily abled counsel, and therefore by what --
23 maybe I should just return to him any letters he sends because
24 I'm not sure he has -- he says in his letter he has a right to
25 bring motions. No, he has a right to have his counsel bring

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1 motions.

2 MS. BAHARANYI: Your Honor, that point I think is
3 actually moot after a conversation that we've had in my office
4 on Monday. He will be directing future correspondence to me
5 and then we will decide which motions to bring to the Court.

6 THE COURT: All right.

7 MS. BAHARANYI: I do want to point out that going back
8 to what this letter means, again, there's --

9 THE COURT: Among other things, it shows he doesn't
10 remotely understand the Constitution of the United States
11 despite his claims that he does. But that's neither here nor
12 there.

13 MS. BAHARANYI: I think in the letter he talks about
14 rights. And I think there are a number of rights that are
15 important to him that he wants to make sure both the Court and
16 the government, all parties are aware of. And I think that's
17 fair to do.

18 THE COURT: His -- he, as I read the letter, the
19 thrust of it is he would love to arm himself with a gun. Now,
20 he says for protection, but under the circumstances that he now
21 finds himself in, why isn't that evidence that he would seek to
22 arm himself with a gun and therefore might pose, under these
23 circumstances, a danger to the community?

24 MS. BAHARANYI: Your Honor, reading through these
25 three and a half pages, there's not a single place in there

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1 where he says he intends to or will violate the law. He gives
2 his opinion on what he believes the law should be.

3 However, what he does not do, what he does not say is
4 that I, Lucha, will be going out and arming myself.

5 THE COURT: He doesn't say that. And that's not the
6 point.

7 MS. BAHARANYI: Your Honor, I do --

8 THE COURT: The point is what inferences should I draw
9 from the fact that he felt so strongly about his desire to have
10 a gun. That, I think, comes across pretty plainly that he put
11 it in a three-and-a-half page letter to the Court.

12 MS. BAHARANYI: He is very, very opinionated. He has
13 strong opinions on what the law should be and those opinions
14 are protected opinions. He's allowed to believe that, he's
15 allowed to state that.

16 THE COURT: Of course.

17 MS. BAHARANYI: What's not in those opinions, or what
18 is missing, though, is any sort of suggestion that he cannot,
19 then, follow the law or comply with the Court's orders or
20 comply with pretrial's orders. And that is what's pivotal,
21 critical to this hearing today, is whether he is someone who
22 can follow the rules set by the Court. He's shown that he can.
23 He's not armed himself with firearms, he has no firearms in his
24 possession, he will not be in possession of any firearms.

25 He's shown himself capable of abiding by the strictest

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1 conditions by pretrial. Remaining in his home 24 hours a day
2 except to go see counsel or the social worker in my office for
3 assistance. That is the conduct that is relevant to this
4 inquiry today or what are the types of conditions, restrictions
5 that should be imposed on this person sitting next to me.

6 This, his opinions, his views, as strong as vehement
7 meant, no matter how much you may disagree or agree with them,
8 those opinions do not suggest in any way that he cannot comply
9 with the rules set by this Court and he cannot comply with the
10 laws of this country. He just also has opinions on these laws
11 and that's what he shared with the Court.

12 THE COURT: Yeah, but he significantly distorts what I
13 said to him.

14 Distorts, suggesting, for example, that I told him,
15 which is not true, that I would only support two amendments of
16 the Constitution and not the others in this case. And the --
17 and I must be a very poor communicator, so I humbly beg your
18 and his apologies for not being able to speak English in a way
19 that he understood, but, by gosh, he didn't understand it at
20 all.

21 And the fact that he so distorted it, makes me
22 concerned about his mental state of mind and how he will
23 conduct himself.

24 MS. BAHARANYI: Your Honor, on that, part of the
25 reason why we've had the conversation that we've had about

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1 ensuring that future correspondence comes to me, to his
2 counsel, is so that there aren't any misunderstandings like
3 what may have happened here. He certainly has no intention of
4 offending the Court, he has no intention of taking any personal
5 digs at the Court.

6 THE COURT: Well, he certainly did, though.

7 MS. BAHARANYI: But that was not his intention, your
8 Honor, and I think to ensure --

9 THE COURT: It's a funny way of expressing his
10 non-intention.

11 MS. BAHARANYI: To ensure that we're as far away from
12 that as possible, again, we have come to an agreement that any
13 future communications will come through me so that we can avoid
14 any moments like this again, any misunderstandings again.

15 But all of this, this letter, these views that he's
16 expressed, his temperament even, does not have anything to do
17 with whether these conditions are the least restrictive
18 conditions. The Bail Reform Act is very clear on what's
19 required when someone is being released on pretrial
20 supervision.

21 THE COURT: Well, I'm not sure that I agree. First of
22 all, the fact that he so misunderstood what I said to him and
23 so distorted it, could arguably be taken as evidence that he
24 would not follow other requirements set by the Court in the
25 future, but would distort them through his own lens.

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1 Moreover, the rambling nature of the letter, at least
2 there's some evidence one might argue of less than meaningful
3 self-control. However, having said that, I will not consider
4 the letter upon this application on the assumption that if he
5 had had better sense and consulted with his lawyer before
6 sending it, he might have reconsidered.

7 So let me hear from pretrial services.

8 MS. DEFEO: Yes, your Honor. So at this time, our
9 office would not consent to a downgrade to a curfew. He has
10 only been under supervision for about two months, which is not
11 a long enough period of time to demonstrate long-term
12 compliance with the conditions of his release.

13 Also, our office does not believe that at this time,
14 there's a substantial change in circumstances that would
15 warrant a departure down to a curfew. Our office policy
16 regarding location monitoring is to gradually decrease the
17 level of home confinement, so we would be open to revisiting
18 this in the future.

19 But at this time, home detention would be appropriate
20 because it will allow him to continue to meet with his
21 attorney, go to court, go to treatment and work.

22 THE COURT: Okay. Go ahead.

23 MS. BAHARANYI: Your Honor, if I may briefly.

24 THE COURT: Yes.

25 MS. BAHARANYI: The Bail Reform Act is quite clear,

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1 there's no provision in 18 U.S.C. 3142 that says that there
2 should be any gradual reduction in conditions. The only
3 conditions that should be imposed are the least restrictive
4 ones.

5 And I appreciate pretrial's position, but I do think
6 there's a difference between the policy that pretrial follows
7 and what the law requires in a case like this. And what the
8 law requires, the least restrictive conditions here, based off
9 of his compliance which no one is disputing, his continued
10 compliance since December 7, the law requires conditions that
11 match that and match his background and match whatever risk he
12 actually poses to the community, which, based on his history,
13 is, in fact, quite minimal.

14 Your Honor, there -- the Court has had the opportunity
15 to now see him in court. I believe this is the Court's second
16 time seeing him in court. He was with me in my office on
17 Monday, also prepared to go to court at that time. He's not a
18 flight risk in any sense of the word. I think with respect to
19 dangerousness, I appreciate the Court disregarding the letter
20 on that piece because do I think that what Mr. El -- what
21 Mr. El has shown and from his background, he's not a danger.
22 He has no violence, no assaults, none of this concerning
23 community behavior that we sometimes see in cases where we are
24 considering such harsh and stringent conditions.

25 So my request today to the Court is to modify his

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1 conditions in light of his compliance that the Court has been
2 able to see, even under very, very strict and difficult
3 circumstances. To modify these conditions in light of that so
4 that he is able to have a bit more freedom of movement in the
5 community, he's not at home 24/7 with just his thoughts and
6 instead is able to engage in productive community engagement.

7 He used to be the person in his neighborhood who would
8 pick up groceries for his elderly neighbors. He was the one
9 cooking for people in his community, going out and giving that
10 food to folks on the street. That's Lucha El. Right now he's
11 in his home sometimes with his computer for hours on end with
12 no healthy productive outlet.

13 I believe that if we modify the conditions to perhaps
14 increase the number of check-ins he has with pretrial, but
15 remove some of the home confinement, the ankle monitoring
16 conditions that I think have truly a deteriorating effect on
17 individuals, that is going to more reasonably assure the safety
18 of the community and reasonably assure his appearance in court
19 more than anything else.

20 With respect to the ankle monitor as well, I've had a
21 chance to speak with Lucha El a bit more about its effects on
22 his health, actually. When he's charging this ankle monitor,
23 he actually feels heat warming from it being connected to the
24 power outlet while he's charging it. He wakes up with his
25 ankle, I guess the sensation is of pins and needles in his

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1 ankle because of the ankle monitor itself.

2 And finally it's had an impact on his relationship
3 with his child. He has a five-year-old son and he and the
4 child's mother are in an ongoing custody battle that's fairly
5 contentious. The fact that he has shown up and is wearing an
6 ankle monitor has been used against him and made it so the
7 family court judge has now used this fact to his detriment in
8 that other setting, that other court.

9 And prior to this because of the, I guess, his child's
10 mother's lawyer was contacted by federal agents as well, is our
11 understanding, and so made aware this case, made aware of this
12 ankle monitor and all of that has made it so he has not seen
13 his son in months.

14 So we believe that some modification of conditions
15 here is appropriate in light of the Bail Reform Act, would also
16 ensure that his health is not further affected. It would also
17 ensure that his relationship with his son is not negatively
18 impacted as well.

19 Thank you, your Honor.

20 THE COURT: Well, it was Oliver Wendell Holmes who
21 famously said that the life of the law is not logic, but
22 experience. And I have to give substantial weight to the
23 experience of the pretrial services officer who deals with
24 these kinds of situations every day.

25 Nonetheless, I think defense counsel has made an

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1 argument that is sufficient for a modification in the bail
2 conditions, but not as far as she now seeks. But the -- I
3 think the proposal, given though opposed by the pretrial
4 services officer, that was originally made by defense counsel
5 and was agreed to by the government or consented to by the
6 government is also agreeable to the Court and a curfew.

7 So I will ask the government with the consultation of
8 defense counsel to draw a new bail order, just the bottom line
9 of the conditions, we don't need anything further. And I agree
10 with the government, it should be left to the pretrial services
11 officer to determine exactly what the curfew should be. But I
12 also agree that it makes sense to have it in the early evening,
13 not the late evening.

14 So that's the ruling of the Court.

15 Thank you, very much.

16 THE DEFENDANT: May I, your Honor.

17 MS. BAHARANYI: I apologize.

18 THE DEFENDANT: May I reserve my right to speak to
19 you, Mr. Rakoff?

20 MS. BAHARANYI: Hold on.

21 Your Honor, before we conclude these proceedings.

22 THE COURT: No. Your client quite contrary to, I
23 think, the implication of what you said to me about his
24 letters, would be thrilled to address the Court. So let me
25 hear from him.

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MS. BAHARANYI: Before --

THE COURT: No, he asked right now to hear from -- let me hear from him.

MS. BAHARANYI: May I speak to my client first?

THE COURT: Yes, of course.

(Defendant and counsel confer)

MS. BAHARANYI: Thank you, your Honor.

Mr. El wanted to inform the Court that he does believe that the two of you, I suppose, got off on the wrong foot and that he does intend to be on a better foot in going forward. So he's giving me permission to communicate that to the Court.

THE COURT: Well, I'm very pleased to hear that. As defense counsel has so eloquently said, my job is simply to apply the law. I don't care if the person in front of me loves me or hates me. It's irrelevant to me. But if, in honor of the day after Valentine's Day we're now off to a better situation, so be it.

MS. BAHARANYI: I think the mood is affecting everyone.

Your Honor, with respect to the modification, I know that curfew can be imposed with location monitoring that can take different forms. We'd ask that the Court endorse a form that does not require the use of an ankle monitor. My understanding is that pretrial is able to monitor curfew using, I guess, what they call voice verification through someone's

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1 phone device. I think that would be an appropriate alternative
2 here, given the issues the ankle monitor has specifically
3 created.

4 THE COURT: What's the government's view?

5 MS. NICOLAS: I actually don't believe that's
6 possible, your Honor, but I defer to pretrial services.

7 THE COURT: Okay. So it's not a possibility.

8 MS. BAHARANYI: So, your Honor --

9 THE COURT: And in addition, I'm not convinced that
10 it's really such a good idea. And I'm sorry that he finds some
11 irritation from using the monitor, but life has its
12 irritations.

13 MS. BAHARANYI: Understood, your Honor.

14 THE COURT: Very good.

15 (Adjourned)

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